

Restrictions on Travel to Cuba: Administration and Enforcement

Prepared Statement of

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I. Introduction

Chairman Dorgan, Members of the Subcommittee,

Thank you for the opportunity today to address issues concerning the administration and enforcement of restrictions on travel-related transactions involving Cuba. As you know, the Treasury Department's Office of Foreign Assets Control ("OFAC") is currently responsible for administering and enforcing 24 economic sanctions programs, most recently the President's September 23 Executive Order targeting persons who commit, threaten to commit, or support terrorism. With respect to the embargo on Cuba, the President, as recently as January 17, has reasserted his commitment to the use of the embargo and travel

restrictions to encourage a transition to democracy in Cuba.

(Tab 1)

When I speak about travel during the course of this testimony, I refer specifically to restrictions on "*transactions* related to travel," rather than simply to "restrictions on travel." OFAC's jurisdiction under the Trading With the Enemy Act ("TWEA") is to prohibit or regulate commercial or financial transactions, not travel *per se*. The licensing criteria set forth in the Cuban Assets Control Regulations, 31 CFR Part 515 (the "Regulations"), implemented under the authority of this statute, address transactions incident to travel and other transactions that are directly incident to those activities deemed consistent with U.S. foreign policy.

We enforce against transactions engaged in by persons subject to U.S. jurisdiction when those transactions are entered into without authorization. In contrast, travel to Cuba that is fully hosted by Cuban or third-country nationals, where nothing of value is provided in return, is not covered by the Regulations. OFAC's jurisdiction under TWEA to regulate these classes of transactions has withstood judicial review and been confirmed by the United States Supreme Court.¹

¹ The Supreme Court upheld restrictions on travel-related transactions with Cuba in Regan v. Wald, 468 U.S. 111 (1984). The Court held that TWEA provides an adequate statutory basis for the 1982 amendment to the Regulations restricting the scope of permissible travel-related transactions with Cuba and Cuban nationals. The Court rejected the argument that such a

II. Licensing

A. Historical Context

The licensing regime applicable to transactions involving Cuba travel took its present form toward the end of the last administration, with an emphasis on people-to-people contact and family reunification. This is only the most recent development in administration policy on the subject, however, and the current status of Cuba travel is very much a legacy of both political parties. I have appended a chronology demonstrating how often the policy has shifted with respect to Cuba travel.

(Tab 2)

In 1977, for example, President Carter lifted restrictions on travel to Cuba in their entirety, such that all travel-related transactions involving Cuba were authorized under a general license. General licenses in OFAC parlance constitute

regulation violates the right to travel guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution. It held that, in light of the traditional deference given to executive judgment in the realm of foreign policy, the Fifth Amendment right to travel did not overcome the foreign policy justifications supporting the President's decision to curtail the flow of currency to Cuba by restricting financial transactions relating to travel to Cuba. The Court rejected the respondents' argument that a restriction on travel was inappropriate because, in their view, there was no "emergency" at the time with respect to Cuba and that the relations between Cuba and the United States were then subject to "only the 'normal' tensions inherent in contemporary international affairs." 468 U.S. at 242. The Court declined to second-guess the

blanket authorization for those transactions set forth in the general license in OFAC's regulations, and are self-selecting and self-executing. No further case-specific permission is required to engage in transactions covered by that general license. Then, in 1982, the pendulum swung in the other direction, and President Reagan reimposed a prohibition on all travel-related transactions. The pre-existing general license was limited to official U.S. or foreign government travel, visits to close relatives, and travel related to journalism, professional research of an academic nature and certain professional meetings.

From 1982 to early 1994, the general license authorization remained unchanged. Travel transactions for humanitarian reasons, public performances, exhibitions, and similar activities were specifically licensed on a case-by-case basis. In 1993, under President Clinton, specific licenses were made available for travel transactions related to educational, religious, and human rights activities and the export or import of informational materials.

In the summer of 1994, responding in part to Cuban policies that resulted in thousands of Cuban rafters crossing the Florida Straits, President Clinton tightened OFAC's licensing regime to

Executive branch on this foreign policy issue. *Id.* See also: Freedom to Travel Campaign v. Newcomb, 82 F 3d 1431 (9th Cir. 1996).

require specific licenses for all but diplomats and full-time journalists. U.S. persons seeking to visit close relatives in Cuba instantly became by far the largest source of specific license applications. The following year, the general license was reinstated for professional research, professional meetings and the first family visit in circumstances of "extreme humanitarian need" during any 12-month period.

Subsequent to the Pope's visit to Cuba in 1998, President Clinton announced a new policy in 1999 to promote increased people-to-people contacts in support of the Cuban people. The result of this policy shift is reflected in the current twelve regulatory categories of activities for which travel-related and other transactions are authorized, either by general or specific license. General licenses continue to apply to diplomats, full-time journalists, professional researchers, certain professional meetings and the first family visit per 12-month period. The requirement that the family visit take place under circumstances of "extreme" humanitarian need, however, was eliminated.

Existing categories were expanded, most requiring case-by-case authorization by specific license, including educational exchanges, religious activities, athletic competition and public performances and exhibitions. In addition, consistent with an overall policy development applicable to most countries subject to economic sanctions programs that liberalized the export of

food and medicine, travel and other transactions directly incident to the marketing, sales negotiation, accompanied delivery or servicing of agricultural exports to Cuba became eligible for authorization by specific license, provided that the exports are of the kind licensed by the Department of Commerce.

Over the years, Congress has been actively involved in the formulation of policy with regard to Cuba generally, and Cuba travel in particular. In 1992, the Cuban Democracy Act (the "CDA") added civil penalty authority and required the creation of an administrative hearing process for civil penalty cases and the establishment of an OFAC satellite office in Miami to assist in administering and enforcing the Cuba program. The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (the "Libertad Act") required that the underlying prohibitions as set forth in the Regulations are to remain in place until there is a transition to a democratically-elected government in Cuba.²

Finally, in 2000, Congress passed the Trade Sanctions Reform and Export Enhancement Act (the "TSRA"), restricting the President's discretionary authority to authorize certain travel-

² In a December 1998 report, the General Accounting Office concluded that this provision of the Libertad Act did not eliminate the President's authority to make modifying amendments to the Regulations, short of lifting the underlying prohibitions. See: Cuban embargo: Selected Issues Relating to Travel, Exports, and Telecommunications, GAO/NSIAD-99-10.

related transactions to, from, or within Cuba. Under section 910 of the TSRA, that authority is restricted to travel-related transactions related to activities ". . . expressly authorized in paragraphs (1) through (12) of section 515.560 of title 31, Code of Federal Regulations, or in any section referred to in any of such paragraphs (1) through (12) (as such sections were in effect on June 1, 2000)." Any activity falling outside of these twelve categories is defined in this section of the TSRA as "tourism" and may not be the basis for issuing a license.

Section 910 of the TSRA also expressly provides for case-by-case review of license applications for travel in support of agricultural exports -- an activity referred to in paragraph (12) of section 515.560 of the Regulations -- but in so doing restricted the President's discretion to authorize such trips by general license. I have appended a synopsis of these twelve categories of activities for which travel-related transactions may be authorized to this testimony for ease of reference. (Tab 3) I have also appended our brochure on Cuba entitled: "What You Need to Know About the U.S. Embargo," which covers all facets of this economic sanctions program. (Tab 4)

B. Licensing

1. Administrative process: OFAC processes a large number of license applications relating to the Cuba embargo, the majority of which concern travel. License applications relating to subsequent family visits, free-lance journalism, educational activities by accredited U.S. academic institutions, religious activities, informational materials and agricultural and medical exports are processed by OFAC's Miami office. During calendar year 2001, the Miami office handled 19,045 license applications for travel, particularly family visits, and at least as many attendant telephone calls.

Another of the office's primary responsibilities is to regulate certain activities of 182 entities nationwide, which are currently licensed to: (1) provide travel and carrier services to authorized travelers; and (2) remit funds to Cuban households on behalf of individuals who are subject to U.S. jurisdiction in the amounts and frequency authorized under the Regulations (the "Service Provider Program"). Almost two-thirds of these licensed entities are headquartered in Miami. Integral to this regulatory program is the licensing and compliance oversight of the direct charter flights to Cuba currently authorized from Miami, Los Angeles and New York to carry authorized travelers. I have appended a copy of OFAC's Circular

2001, setting forth guidelines applicable to the Service Provider Program. (Tab 5) The Miami office also investigates alleged violations of the Regulations and processes enforcement referrals from the U.S. Customs Service and the U.S. Coast Guard.

The remaining travel-related license applications are processed at OFAC's main office in Washington, DC, along with all non-travel license applications involving Cuba, relating to everything from blocked estates to international corporate acquisitions. The travel-related applications include those involving professional research and attendance at professional meetings not covered by the general license, educational exchanges not involving academic study pursuant to a degree program, participation in a public performance, clinic, workshop, athletic or other competition, or exhibition in Cuba, support for the Cuban people as provided in the CDA, humanitarian projects, activities of private foundations or research or educational institutes, and exports of medicine or medical supplies and certain telecommunications equipment or reexports of U.S.-origin agricultural commodities from a third country to Cuba. During calendar year 2001, OFAC's Washington, DC staff handled 1,283 license applications for travel in these various categories, with support from Treasury's Office of the General Counsel.

We endeavor to process license applications within two weeks absent the need for interagency review, and most travel-related applications fall within this category. There are many instances, however, where a given application fails to meet the applicable licensing criteria. Depending upon the circumstances, the licensing officer may contact the applicant to request additional information or clarification or prepare a letter of denial. Certain applications may have been delayed by the anthrax threat, which caused the main Treasury Department mailroom to shut down for several weeks. Mail continues to be delayed for up to two months because of the decontamination process that has since been put into place.

2. Licensing Criteria: Recent events have unfortunately given rise to misperceptions on the part of the U.S. public regarding travel to Cuba. While travel for purposes of tourism or most business transactions remains strictly prohibited, travel guides to Cuba are readily available in any bookstore or on the internet portraying Cuba as just another Caribbean tourist destination. The Pope's visit to Cuba in 1998, President Clinton's 1999 people-to-people initiative, the recent surge in popularity of Cuban music and culture and the Elian Gonzales case have all served to focus the American public's interest and attention on this country.

It appears that a great deal of the current frustration regarding the denial of license applications involves a disconnect on what constitutes an "educational exchange" or "people-to-people contact." These terms are often used in license applications but are not accompanied by material sufficient to demonstrate eligibility according to the applicable licensing criteria. We will continue to streamline these licensing criteria and, at the same time, promote greater transparency and understanding by the public.

Educational exchanges not involving academic study pursuant to a degree program must take place under the auspices of an organization that sponsors and organizes such programs to promote people-to-people contact. We have published explanatory guidelines on our Internet website. (Tab 6) These guidelines provide, in part, that people-to-people contact normally entails direct interaction between U.S. and Cuban individuals not affiliated with the Cuban government, and normally does not involve meetings with Cuban government officials. OFAC evaluates, among other things, whether the U.S. program is structured to result in direct and individual dialogue with the Cuban people and whether the proposed activities with the Cuban people are educational in nature, such as participation in joint activities that may include seminars, lectures and workshops. OFAC also evaluates whether each traveler will be fully

participating in all of the proposed people-to-people activities.

Educational exchange involving people-to-people contact does not include travel for purposes of, for example: railroad hobbyists' desire to see aging locomotives in Cuba; a U.S. city's desire to establish a sister city relationship with government officials of a Cuban city or province, or a group of architects getting together to take a walking tour of Havana. Such proposed itineraries are not made more acceptable by a traveler's commitment to distribute a small amount of over-the-counter medicines or visit Cuban clergy or dissidents during the trip, when such contacts are minimal and clearly not the primary focus of the trip.

Two-year licenses for such exchanges issued at the advent of the people-to-people initiative in 1999 are now coming up for renewal. As we review activities undertaken pursuant to those licenses during the past two years, it appears that not all of the activities that took place pursuant to those licenses entirely conformed to the intent of the licenses as issued. For example, some license holders allowed other groups to travel to Cuba under the authority of their licensees when that particular use of the license was not contemplated in the original submission to OFAC. Accordingly, we are exercising a heightened degree of scrutiny in our review of these requests for renewals,

and are incorporating reporting requirements into the renewed licenses to ensure better compliance.

Finally, there has also been some confusion with respect to our licensing criteria with respect to applications to permit persons to travel to Cuba in conjunction with the exportation of agricultural commodities authorized by the Department of Commerce. Consistent with the TSRA, the Regulations provide that travel and other transactions that are directly incident to the "marketing, sales negotiation, accompanied delivery, or servicing of exports that appear consistent with the export licensing policy of the Department of Commerce" may be authorized by specific license.³

This licensing criterion does not include trade missions to discuss transactions that are not currently authorized, such as direct U.S. financing, with a view toward the eventual end of the embargo. It also does not permit individuals with no apparent nexus to this criterion to join the trip, simply out of

³ General transportation services relating to these exports are authorized by general license. Consistent with the CDA, vessels are authorized by another OFAC general license to carry goods to Cuba that are authorized for export by the Department of Commerce provided that: (1) they have not engaged in trade or purchased or provided services in Cuba within 180 days or; (2) the vessels are not otherwise carrying goods or passengers in which Cuba or a Cuban national has an interest. Vessels not qualifying for this general authorization may be specifically licensed. Financing of these exports is restricted by the TSRA to payment of cash in advance or to financing by third country financial institutions, except that such financing may be

personal interest or a familial relationship to another traveler. While there is no limitation on numbers of participants in any given group, this nexus must exist between each traveler and the activity in which he or she seeks to engage. Large numbers are sometimes an indication that no such nexus exists. We have just issued explanatory guidelines on our website to provide additional guidance to persons applying for these licenses. (Tab 7)

III. Enforcement

A. Historical Context

Prior to 1992, OFAC lacked civil penalty authority to enforce the Cuban embargo. Criminal prosecution of travel-related violations was extremely rare. In my experience, U.S. Attorneys often do not accept travel violations for criminal prosecution absent other illegal commercial or financial transactions by the traveler involving Cuba or Cuban nationals. The lack of criminal prosecutions is widely reported in the media and in almost any travel publication that discusses Cuba.

With the passage of the CDA in 1992, the Trading With the Enemy Act ("TWEA") was amended to provide that civil fines of up to \$100,000 may be assessed against any person who has been confirmed or advised by a United States financial institution.

to \$50,000 (now adjusted for inflation to \$55,000) could be levied for violations of the Regulations. The CDA also required that the Secretary of the Treasury impose such penalties "only on the record after opportunity for an agency hearing . . . with the right to pre-hearing discovery." In 1996, the LIBERTAD Act increased the number of categories of violations for which civil penalties may be sought to include all travel-related violations. In February 1997, OFAC promulgated proposed regulations to govern the hearings, and in March 1998 published final regulations. Judicial review by Article III courts is available once the Administrative Law Judge's civil penalty determination is made final.

No administrative review process is currently in place, despite efforts over the years to establish such a process. I am pleased to note, however, that Secretary O'Neill has approved a proposal for Treasury Department funding of two Administrative Law Judges with the necessary support staff.

B. Investigation

The majority of OFAC's enforcement actions with respect to the Cuba embargo concern individuals who engage in unauthorized travel transactions related to Cuba tourism. For many reasons, including those previously articulated, increasingly larger

numbers of Americans disregard the law and travel to Cuba purely for tourism. Interest in Cuba on the part of otherwise law-abiding Americans has also been exploited by foreign travel agencies that falsely advertise trips to Cuba claiming that such travel is legal. OFAC has endeavored to correct these agencies' misrepresentations by contacting them directly and placing advisories for all to see on our website. (Tab 8)

Beyond tourism, certain organizations and individuals view travel to Cuba as an act of civil disobedience. Organized challenges to the embargo have taken the form of protests involving unlicensed travel transactions and the unlicensed export of goods. There are passionate constituencies on both sides of this issue, those who believe that we do not do enough to stem the flow of U.S. tourist travel to Cuba and those who believe that any regulation of travel is an infringement of their constitutional rights.

OFAC has worked hard to develop procedures with the Customs Service to identify unlicensed travelers returning to the United States from Cuba. We have endeavored to enforce these restrictions in an evenhanded manner that is consistent with our responsibilities under the law. Returning Cuba travelers are identified by Customs agents and inspectors at ports of entry in the United States or at U.S. Customs Preclearance Facilities in Canada or the Bahamas. Those travelers who do not claim a

general or specific license from OFAC to engage in Cuba travel-related transactions are routinely referred to OFAC for investigation and civil penalty action. This workload is an extremely heavy drain on finite enforcement and legal resources.

C. Civil Penalties

When an enforcement case is referred for civil penalty consideration, the administrative record either contains evidence of transactions involving Cuba or the prepenalty notice is premised upon a rebuttable presumption that an individual traveling to Cuba necessarily engaged in transactions involving Cuba. This presumption appears in OFAC's Regulations and may be rebutted by documentation establishing that the traveler was fully hosted by a Cuban or third-country national. If the presumption is not rebutted, a prepenalty notice with statement of rights and procedures attached is then issued alleging violations of the embargo. (Tab 9) In many instances, individuals request an informal settlement before OFAC issues a prepenalty notice.

Typical penalty assessments for unauthorized travel range from \$5,000 to \$7,500, but the majority of cases are settled in amounts ranging from roughly \$2,000 to \$5,000, depending upon the circumstances. A number of prepenalty notice recipients,

however, request administrative hearings, often with the assistance of public interest legal organizations. As previously mentioned, these cases are awaiting the funding and selection of Administrative Law Judges.

I have appended a chart that depicts our Cuba travel enforcement case openings and referrals for civil penalty review, as well as the number of Cuba travel Prepenalty Notices issued, for the period of January 1996 through June 2001. (Tab 10) As shown, 4,535 travel cases were opened for investigation; 1,690 cases were referred for civil penalty review; and Prepenalty Notices were issued in 947 cases. Again, many individuals request informal settlements with OFAC without the issuance of prepenalty notices.

III. Conclusion

At this time, OFAC devotes approximately 5% of its budget and 7 full-time equivalent positions to the administration and enforcement of restrictions involving travel to Cuba. In addition, Treasury's Office of the General Counsel devotes significant resources in support of these efforts. OFAC remains committed to carrying out the President's mandate that enforcement of the Cuba embargo be enhanced under current law. OFAC will continue to administer and enforce the restrictions on

travel-related transactions involving Cuba in a manner that is timely, fair, and consistent with that law.

Thank you.